No. 97-1192

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SWIDLER & BERLIN AND JAMES HAMILTON,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attorney-client privilege under Fed. R. Evid. 501 authorizes disclosure of information "whose relative importance is substantial" in federal criminal proceedings after the client's death.

2. Whether the work product doctrine authorizes disclosure of an attorney's notes of an interview with a witness who is deceased and therefore unavailable.

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States, represented in this criminal investigation by the Independent Counsel in re: Madison Guaranty Savings & Loan Association, *see* 28 U.S.C. § 594(a); James Hamilton; and the law firm Swidler & Berlin.

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OPINIONS BELOW

The opinion of the court of appeals and a redacted version of the dissent are reported at 124 F.3d 230 and printed in full in Petitioners' Appendix (Pet. App. 1a-26a). The court's order on petition for rehearing is reported at 129 F.3d 637 (Pet. App. 27a-32a). The district court's two substantively identical opinions (one for each of the two subpoenas at issue) are unreported (Pet. App. 34a-42a and 44a-53a).

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1997. The court denied a petition for rehearing on November 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. On August 5, 1994, pursuant to the application of Attorney General Reno under 28 U.S.C. § 592(c), the United States Court of Appeals for the District of Columbia Circuit, Division for the Purpose of Appointing Independent Counsels (Special Division), appointed Kenneth W. Starr as Independent Counsel to represent the United States in investigating particular matters regarding President and Mrs. Clinton, Whitewater Development Corp., and Madison Guaranty Savings & Loan. *In re Madison Guaranty Savings & Loan Association* (D.C. Cir. Spec. Div. Aug. 5, 1994). In March and April 1996, acting under 28 U.S.C. §§ 593(c)(1) and 594(e), the Attorney General and the Special Division authorized the Office of the Independent Counsel to investigate whether particular individuals had made false statements or committed other federal crimes during various government investigations of the firings of White House Travel Office employees.

2. On May 19, 1993, the White House fired seven employees of the White House Travel Office. In response to criticism of the firings, the White House conducted an internal management review, issued a report, and reprimanded four White House officers and employees. On July 2, 1993, the Supplemental Appropriations Act of 1993, Pub. L. 103-50, was enacted, which required the General Accounting Office to review the firings.

3. On Sunday, July 11, 1993, James Hamilton, an attorney with the Washington, D.C., law firm of Swidler & Berlin, met with Deputy White House Counsel Vincent W. Foster, Jr. Mr. Foster, a former partner of Hillary Rodham Clinton's at the Rose Law Firm in Little Rock, Arkansas, had been involved in the process leading up to the Travel Office firings, although he had not been reprimanded. The July 11 conversation related to Mr. Hamilton's possible representation of Mr. Foster with respect to congressional or other investigations of the Travel Office matter. At the meeting, Mr. Hamilton took three pages of notes, which are at issue in this case. Pet. App. 31a.

On July 20, 1993, nine days after meeting with Mr. Hamilton, Mr. Foster was found dead in Fort Marcy Park in suburban Virginia. A series of official investigations ensued, all of which have concluded that Mr. Foster had killed himself by gunshot in Fort Marcy Park.

4. There is no dispute that Mr. Foster would have been an important witness in this Office's investigation of whether particular individuals made false statements or committed other federal crimes during investigations of the Travel Office firings. Because Mr. Foster is deceased, this Office has attempted, consistent with traditional and standard law enforcement practice, to obtain evidence of Mr. Foster's knowledge of the matter through any oral statements or writings he may have made. The notes taken by Mr. Hamilton during his meeting with Mr. Foster on July 11, 1993, regarding the Travel Office matter are highly relevant to this Office's investigttion.

5. On December 4, 1995, at a time when this Office was investigating Mr. Foster's death, the grand jury

subpoenaed Mr. Hamilton's notes and other documents. Petitioners (Mr. Hamilton and his law firm, Swidler & Berlin) moved to quash or modify the subpoena. On order of the district court, Mr. Hamilton produced a privilege log on July 9, 1996. On July 16, 1996, this Office identified and sought various documents listed on that log, including the notes of the 1993 conversation with Mr. Foster. In resisting the subpoena, Mr. Hamilton argued, first, that the notes were protected by the attorney-client privilege, which he contended applies even after the client's death; and, second, that they were protected by the work product doctrine.

On December 16, 1996, the district court granted Mr. Hamilton's motion in relevant part without specifically addressing whether attorney-client privilege survives the death of the client. The court found the notes protected by the attorney-client privilege and work product doctrine.

6. This Office appealed, and the court of appeals reversed. The court noted that in the vast majority of cases addressing the issue—particularly those concerning testator's intent in a will dispute—courts have held the privilege inapplicable. Pet. App. 3a. The court also emphasized that most commentators have "supported some measure of post-death curtailment" of the privilege. Pet. App. 4a. The court pointed out that Wright & Graham have emphatically rejected the suggestion that the privilege should continue to apply after death. So, too, McCormick has argued that the privilege should not apply after death. The court also cited Mueller & Kirkpatrick, who likewise concluded that the privilege should not apply after death. Pet. App. 4a-5a. The court cited Learned Hand's argument that privilege

should not apply after death. Finally, the court pointed out that the American Law Institute, in the latest draft of the Restatement (Third) of the Law Governing Lawyers, had rejected a perpetual privilege. The court noted that the ALI had suggested "a general balancing test" under which "a tribunal be empowered to withhold the privilege of a person then deceased." Pet. App. 5a.

The court concluded: "The costs of protecting communications after death are high. Obviously the death removes the client as a direct source of information; indeed, his availability has been conventionally invoked as an explanation of why the privilege only slightly impairs access to truth." Pet. App. 7a. On the other side of the balance, the court found that "the risk of post-death relevation will typically trouble the client less" and that a post-death restriction of the privilege to the realm of criminal litigation will likely cause a chilling effect "fall[ing] somewhere between modest and nil." Pet. App. 6a-7a. The court also noted that the individual "may even view history's claims to truth as more deserving." Pet. App. 7a. Because criminal liability ceases at death, the court concluded that modifying the privilege solely in the realm of criminal litigation, and leaving it unaffected in civil litigation, would exert little if any chilling effect on attorney-client communications. *Id.* Following the approach advocated by the Restatement, the court thus defined a narrow, sharply bounded exception, limited (i) to *criminal* proceedings and (ii) to statements of particular importance: "the statements must bear on a significant aspect of the crimes at issue, and an aspect as to which there is a scarcity of reliable evidence." Pet. App. 10a. The court remanded the case to the district court for application of this test to the notes at issue here.

Turning to the issue of work product, the court distinguished factual information contained in an attorney's notes of an interview with an unavailable witness from the attorney's own evaluations. The court stated that "[o]ur brief review of the documents reveals portions containing factual material" and therefore rejected the district court's conclusion. Pet. App. 14a.

Judge Tatel dissented solely on the question of attorney-client privilege, and "therefore [did] not consider whether the notes are attorney work product." Pet. App. 15a. The court of appeals denied petitioners' suggestion for rehearing en banc. Pet. App. 27a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Indeed, the decision of the court of appeals is the first federal decision addressing the question. The panel's decision comports with the vast majority of decided cases addressing the general question of whether attorney-client privilege fully survives the client's death. It closely tracks the virtually unanimous views advocated by the ALI, by commentators such as McCormick, Wright & Graham, Wolfram, Mueller & Kirkpatrick, and by legal luminaries such as Learned Hand.

Given the novelty of the issue in the federal courts of appeals, and the court of appeals' decision to carefully follow the body of law and commentary, review here is unwarranted, especially inasmuch as the case arises in the midst of an ongoing grand jury investigation.

I

Preliminarily, we take note of an important prudential consideration: This Court's review would further delay an important grand jury investigation which touches on vital matters of public concern. *The grand jury subpoena was issued over 26 months ago*, yet there still has not been a final judicial resolution. Delay of this magnitude seriously impedes a grand jury investigation. This Court's review—on a narrow issue of first impression with no circuit split—would cause further lengthy delays. Because "extended litigation" impedes the "orderly progress of an investigation," *United States v. Calandra*, 414 U.S. 338, 349 (1974), and "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws," *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991), federal courts attempt to avoid the "protracted interruption of grand jury proceedings," *Calandra*, 414 U.S. at 350.

The dictates of this Court's Rule 10 are clearly not met. There is no circuit split. The decision below does not conflict with any decision of the Supreme Court or any other federal court. Indeed, the decision is the *first* federal case addressing whether the attorney-client privilege applies in federal *criminal* proceedings after the client's death. As the dearth of case law suggests, the issue is exceedingly narrow, and the court of appeals' resolution of it will have no effect on attorney-client privilege in *civil* litigation. The novelty and the narrowness of the issue counsel hesitation before this Court exercises its discretionary certiorari jurisdiction.

1. Before this case, no federal court had ever had occasion to rule on whether the attorney-client priv-

ilege applies in federal criminal proceedings after the client's death. In attempting to manufacture an inter-circuit conflict, petitioners claim that the decision conflicts with two Ninth Circuit decisions. Pet. 10. Both of those decisions, however, are *civil* cases. The court of appeals in this case stated explicitly that its decision applies solely to *criminal* cases: "We reject a general balancing test in all but this narrow circumstance"—namely, "use in criminal proceedings after death of the client." Pet. App. 8a.

2. The court's decision accords with the vast majority of cases addressing whether the attorney-client privilege survives death outside the context of a federal criminal investigation. The question has arisen most frequently in state decisions. Almost all of the cases have involved disputes over a will. Pet. App. 3a (95% of cases raising the issue have been testamentary disputes). In these testamentary cases, state and federal courts have consistently held that the privilege does *not* survive death. *See id.* The operation of the attorney-client privilege thus has been "nullified in the class of cases where it would most often be asserted after death." *McCormick on Evidence* § 94, at 348 (4th ed. 1992); *see also* 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380 (2d ed. 1994) (privilege "inapplicable" in cases where the communications "are most likely to be sought"). The court's conclusion that the privilege does not automatically apply after the client's death in criminal proceedings follows *a fortiori* from the vast body of case law holding that the privilege does not apply after death in testamentary disputes. As this Court has stated, the need for evidence is "particularly applicable to grand jury proceedings." *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). That conclusion

follows as well from the deeply rooted principle that an evidentiary privilege, which "obstructs the truth-finding process," must be "narrowly construed." Pet. App. 6a. Because the attorney-client privilege "has the effect of withholding relevant information from the factfinder, it applies only where *necessary* to achieve its purpose." *Fisher v. United States*, 425 U.S. 391, 403 (1976) (emphasis added). Given that courts have consistently found that it is not necessary to apply the privilege after death in testamentary cases, it logically follows that it is not necessary to apply the privilege after death in criminal cases—circumstances which arise less frequently and present a far more compelling need for evidence.[1]

In the state courts, only a handful of criminal cases have addressed this issue, with several concluding that the privilege does not apply after death. In *State v. Gause*, 489 P.2d 830 (Ariz. 1971), for ex-

[1] Petitioners suggest that any privilege must apply uniformly in all proceedings (civil and criminal), Pet. 11, but that argument flies in the face of settled law. Many privileges are applied in a context-specific manner and carry less weight in criminal proceedings than in other settings. They include, for example, the Executive privilege for Presidential communications, *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974); the governmental privilege for deliberative processes; the qualified reporter's privilege; and the informer's privilege.

Petitioners' separate suggestion that privileges must be recognized to the same extent in state and federal court, Pet. 10, is likewise contrary to Supreme Court precedent. *See United States v. Gillock*, 445 U.S. 360, 368 (1980) (state evidentiary privilege "which Gillock could assert in a criminal prosecution in state court does not compel an analogous privilege in a federal prosecution"); *Trammel v. United States*, 445 U.S. 40, 49 (1980) (declining to recognize adverse spousal testimony privilege although 24 states did so).

ample, the defendant was found guilty of murdering his wife and was sentenced to death. The Arizona Supreme Court held that the attorney-client privilege did not require exclusion of statements made by the wife to her attorney before her death. A similar scenario was presented in *State v. Kump*, 301 P.2d 808 (Wyo. 1956). The Wyoming Supreme Court held the statements admissible, stating that "[w]e can conceive of no public policy which would exclude the communications such as are involved in this case."[2] *Id.* at 815. Of the few civil cases outside the testamentary context, the only case with meaningful analysis concluded that the privilege does not survive death. *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (Pa. Super. Ct. 1976).

In sum, the cases that have actually decided this privilege issue overwhelmingly accord with the decision of the court of appeals. *See* Pet. App. 3a; *see also* Frankel, *The Attorney-Client Privilege After the Death of the Client*, 6 Geo. J. Leg. Ethics 45, 58 n.65 (1992) (95% of cases arise in testamentary context, where privilege does not apply after death).

[2] In the three other state supreme court cases that have decided the issue, the courts held that the privilege applies after death, although there were dissents in two of those cases. *See In re John Doe Grand Jury Investigation*, 562 N.E.2d 69, 72 (Mass. 1990) (Nolan, J., dissenting), advocating "limited exception to the privilege . . . where the interests of the client are so insignificant and the interests of justice in obtaining the information so compelling"); *State v. Macumber*, 544 P.2d 1084, 1088 (Ariz. 1976) (Holahan, J. and Cameron, C.J., dissenting) ("When the client died there was no chance of prosecution for other crimes . . . . Opposed to the property interest of the deceased client is the vital interest of the accused in this case in defending himself against the charge of first degree murder.").

The court of appeals correctly found that "there is little by way of judicial holding that affirms the survival of the privilege after death." Pet. App. 4a. Moreover, the "relatively rare" cases that "do actually apply it give little revelation of whatever reasoning may have explained the outcome." Pet. App. 3a; *see also Frankel* at 57 n.63 ("only a few judicial opinions offer[] any extensive discussion").[3]

3. The court of appeals decision follows the approach advocated by the American Law Institute and the vast majority of commentators. The Restatement of the Law Governing Lawyers states that allowing posthumous disclosure "would do little to inhibit clients from confiding in their lawyers." Restatement (Third) of the Law Governing Lawyers § 127 comment d (March 29, 1996). McCormick opposed continuation of the privilege after death, stating: "[T]o hold that in all cases death terminates the privilege . . . could not in any substantial degree lessen the encouragement for free disclosure which

[3] Petitioners suggest that several evidence codes have held the privilege applies after death in perpetuity. Pet. 13-14. That is incorrect, as the court of appeals explained. Pet. App. 4a n.2, 9a. To begin with, most codes addressing the issue contain a rule that the attorney-client privilege does not apply in testamentary disputes, the very situation in which the issue most often arises. Some state and model codes also indicate that the privilege may be asserted by the personal representative of the client, but as the court stated, "the framing of the posthumous privilege as belonging to the client's estate or personal representative both suggests that the privilege may terminate on the winding up of the estate and reflects a primary focus on civil litigation." Pet. App. 4a. These provisions thus say nothing about the appropriate rule in criminal proceedings in which, unlike in civil proceedings, neither the client nor the client's estate is subject to liability.

is the purpose of the privilege." McCormick § 94, at 350. Learned Hand also opposed the privilege after death, saying that "a communicant who dies can have no more interests except in a remote way." 19 *ALI Proceedings*, 1942, at 143. The views of Mueller & Kirkpatrick are similar: "Few clients are much concerned with what will happen sometime after the death that everyone expects but few anticipate in an immediate or definite sense." 2 Mueller & Kirkpatrick, *Federal Evidence* § 197, at 380. Wright & Graham concur, stating that "the typical client" would not have "much concern for how posterity may view his communications." 24 Wright & Graham, *Federal Practice and Procedure* § 5498, at 484 (1986). Wolfram also noted the oddity of holding that the privilege does not continue in testamentary cases but that it does in other cases. Wolfram, *Modern Legal Ethics* § 6.3.4, at 256 (1986).

4. The court of appeals decision carefully analyzes and accommodates the competing policy goals of (i) obtaining relevant evidence and (ii) protecting the traditional common-law privileged relationship. On the one hand, application of the privilege after the client's death would have far more serious consequences than application of the privilege before death. After a client's death, there will be "a loss of crucial information because the client is no longer available to be asked what he knows." 24 Wright & Graham § 5498, at 484; *see also* Wolfram at 256 (application after death "in effect gives an expanded scope to the privilege"). As the court of appeals reasoned, the death of the client thus not only eliminates a vital source of information; it also negates a longstanding justification for the attorney-client privilege: that

the client can be questioned directly about the relevant factual events. Pet. App. 7a.

On the other side of the ledger, the federal attorney-client privilege—which is not a constitutional command but a creature of federal rule—assures the client that certain communications to his attorney cannot be used in federal criminal or civil proceedings. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege thus tends to encourage full and frank communications from client to attorney and thereby furthers the policy of ensuring that clients receive effective legal advice. The court's decision does not dilute that policy, however, because the client no longer faces criminal liability after his death, when the communications would be disclosed. *See* Pet. App. 6a ("criminal liability will have ceased altogether").

Petitioners respond that a client may be less forthcoming in communications to his attorney, even if assured that they cannot be used against him to impose criminal or civil liability, because of a fear that posthumous disclosure of his communications would adversely affect his reputation or interests of others about whom the client cares. Pet. 8, 15. This argument suffers from a fundamental flaw: The client's interest in his own reputation and in protecting friends and associates from liability cannot justify nondisclosure of information after death because it does not justify nondisclosure of information before death. When the client is alive, *he must testify truthfully as to all facts—regardless of how harmful those facts are to his reputation or to the interests of others. See United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975) ("Testimony demanded of a witness

may be very private indeed").[4] And the client who testifies must disclose the same factual information that he disclosed to his attorney; the attorney cannot stand pat if the client commits perjury.[5] After the client's death, the attorney simply would disclose the same factual information that the client himself would have disclosed had the client been alive. Given this reality, petitioners' argument based on reputation and protecting others has no more force with respect to post-death application of the privilege than it does with respect to the client's duty to testify truthfully when he is alive.

Moreover, the courts have rejected petitioners' chilling-effect argument in testamentary cases—the very situation where the communications disclosed are the most sensitive and personal imaginable. "Estate planning . . . may be based on considerations one would prefer never to reveal." *Hitt v. Stephens*, 675 N.E.2d 275, 279 (Ill. App. 1997). For example, as the court noted here, "a decedent might want to provide for an illegitimate child but at the same time much prefer

[4] The client can assert the Fifth Amendment privilege but only to protect himself from compelled self-incrimination, not to protect himself from embarrassment or to protect others. Moreover, the client who interposes the Fifth Amendment privilege can be immunized and then must testify truthfully as to all relevant facts.

[5] *See* D.C. Rules of Professional Conduct 3.3(a)(4), (b); Model Rules of Professional Conduct 3.3(a)-(b) & comment 6 to Rule 3.3 ("an advocate must disclose the existence of the client's deception to the court or to the other party" except when client is criminal defendant). By communicating a particular version of facts to his attorney, the client essentially commits himself to that same version of facts if he subsequently testifies.

that the relationship go undisclosed." Pet. App. 9a. The will-contest situation thus is "the one occasion *above all others* when a client is likely to be moved to silence in conversations with a lawyer if the client becomes aware that disclosures can be made after the client's death." Wolfram at 256 (emphasis added). Yet the courts have consistently held that the need to settle disputes over wills trumps any such interest in reputation or privacy, and that the attorney-client privilege does not apply after death in such cases.[6]

Furthermore, empirical support for petitioners' argument is nonexistent. *See* Frankel at 61 (available empirical evidence "tells us little"); *cf. Branzburg*, 408 U.S. at 693-694 (rejecting First Amendment privilege claims where "[e]stimates of the inhibiting effect of such subpoenas . . . are widely divergent and to a great extent speculative"). Petitioners' many suggestions that Mr. Foster would have wanted to conceal the truth of this matter are speculative at best. As the court of appeals stated, Mr. Foster, like others, might "view history's claims to truth as more deserving." Pet. App. 7a. Moreover, because the court's decision is limited to the criminal context, cases where the situation will arise are so rare—as reflected in the fact that this is the first federal case ever litigated—that any hypothesized chilling effect would be minimal. *See id.* ("To the extent, then, that any post-death restriction of the

[6] Petitioners attempt to explain those cases by suggesting that testators actually intended for attorney-client communications to be disclosed after death. Pet. 11. They are wrong. The court below and the commentators have correctly rejected that *post hoc* rationalization, for it is, in fact, highly unlikely that all testators actually intend that such communications be disclosed. *See* Pet. App. 9a; Wolfram at 256.

privilege can be confined to the realm of criminal litigation, we should expect the restriction's chilling effect to fall somewhere between modest and nil."); *cf. Nixon*, 418 U.S. at 712 ("we cannot conclude that advisers [to the President] will be moved to temper the candor of their remarks by the infrequent occasions of disclosure" in criminal proceedings). Even if there were a marginal chilling effect in certain cases, this Court has consistently concluded that a marginal chilling effect on a protected constitutional or common-law privilege is outweighed by the interest in obtaining relevant evidence for criminal proceedings.[7]

5. The implications of petitioners' position warrant brief mention. Those implications are best understood by examining the kinds of situations where the issue can arise and has arisen.

Suppose, for example, that a crime has occurred and that there are two suspects, one of whom is now deceased but had previously communicated to an attorney. That suspect's communications to the attorney could exculpate the still-living suspect. Under petitioners' approach, courts could not compel disclosure of that information—despite the manifest injustice that could result. *See State v. Macumber*, 544 P.2d 1084 (presenting those facts).

[7] *See Nixon*, 418 U.S. at 712 (rejecting Executive privilege claim although Court acknowledges that the President and his advisers need to communicate confidentially); *Branzburg*, 408 U.S. at 693 (rejecting First Amendment privilege claim although "argument that the flow of news will be diminished . . . is not irrational"); *see also University of Pennsylvania v. EEOC*, 493 U.S. 182, 193 (1990) (rejecting First Amendment privilege claim although accepting that "confidentiality is important to proper functioning of the peer review process").

Similarly, a now-deceased witness might have observed the commission of a crime and discussed it with his attorney. Again, the information provided by the witness could exculpate or inculpate another person, but petitioners' absolutist approach nonetheless could prevent disclosure. *Cf. Cohen v. Jenkintown Cab Co.*, 357 A.2d 689 (presenting similar scenario in civil context).

Or a wife battered by her husband might recount to her attorney the husband's threats to her life. Under petitioners' approach, if the wife were then found beaten to death, the courts could not require disclosure of the information she had communicated to the attorney, despite the manifest injustice that could result. *See State v. Gause*, 489 P.2d 830; *State v. Kump*, 301 P.2d 808 (addressing issue on those facts).

No policy reason justifies these predictable results flowing from petitioners' desired culture of permanent secrecy. These examples of the severe harm that petitioners' proposed secrecy rule would generate illustrate powerfully why the vast majority of courts, the ALI, and respected commentators have rejected it.[8]

II

Petitioners also seek review on the work product issue. The court of appeals concluded that an attor-

[8] Petitioners now, for the first time, apparently are willing to carve out exceptions *ad hoc* for various of these situations to make their drastic position more palatable. Pet. 11-12. But the many exceptions that petitioners allow do no more than expose the hollowness of their legal theory. The only coherent rationale justifying petitioners' tolerance of numerous "exceptions" is that they are not this case. That hardly is a persuasive position.

ney's notes of an interview with a deceased witness are not protected from disclosure under all circumstances. The federal courts of appeals that have addressed the issue have reached the same conclusion. See *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979) (requiring production of attorney memoranda of interview with deceased employee). Likewise, the Restatement provides that courts may order production of "notes in redacted form" when the "notes of an interview contain[] both the recollections of the witness and the thoughts of the lawyer who made the notes." Restatement § 138 comment c. Petitioners cite not a single case reaching the contrary conclusion, and their argument has no support in law or policy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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